

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2006

To be argued by:
RALPH McMURRY

UNITED STATES COURT OF APPEALS
OR THE SECOND CIRCUIT

-----X

THOMAS LIPUMA,

Petitioner-Appellee,

- against -

77-2006

COMMISSIONER OF CORRECTIONS,
et al.,

Respondents-Appellants.

-----X

BRIEF FOR RESPONDENT APPELLANT

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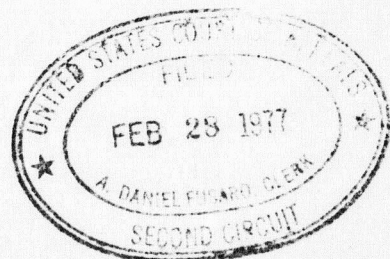


TABLE OF CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Questions Presented.....	2
Facts	
A. The Crime.....	3
B. Evidence at Trial.....	5
1. Prosecution	
Geibel burglary.....	5
Robinson burglary.....	6
Arrival of police and arrest.....	6
2. Defense.....	9
C. Efforts of Petitioner's Counsel In His Behalf...	11
D. The "Forgotten" Motion to Suppress.....	13
POINT ONE -- PETITIONER HAS WAIVED HIS CLAIM FOR PURPOSES OF FEDERAL HABEAS REVIEW.....	17
POINT TWO -- PETITIONER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.....	20
A. Mrs. Geibel's Identification.....	21
B. Likelihood of Success of Petitioner's Motion to Suppress and his Standing to Make Motion to Suppress; and Defense Counsel's Actual Trial Strategy.....	33
Conclusion.....	38

TABLE OF CASES

	<u>PAGE</u>
<u>Alderman v. United States</u> , 394 U.S. 165 (1969).....	36
<u>Browder v. Illinois Corrections</u> , No. 76-5325, cert. granted 45 USLW 3580.....	18
<u>Brown v. Swenson</u> , 487 F. 2d 1236, (8th Cir. 1973).....	23
<u>Brubaker v. Dickson</u> , 310 F. 2d 30 (9th Cir. 1962), cert. den. 372 U.S. 978.....	22
<u>Chapman v. California</u> , 386 U.S. 18 (1967).....	32
<u>Frazier v. Cupp</u> , 394 U.S. 731 (1969).....	35
<u>Gates v. Henderson</u> , ____ F. 2d ____ (2d Cir. 1977) Slip. Op. 1345.....	19, 20, 22
<u>Harried v. United States</u> , 389 F. 2d 281 (D. C. Cir. 1967).....	37
<u>Harrington v. California</u> , 395 U.S. 250 (1969).....	32
<u>Henry v. Mississippi</u> , 379 U.S. 443 (1965).....	18
<u>Kapalis v. United States</u> , 345 F. 2d 392 (7th Cir. 1965) cert. den. 382 U.S. 946 (1965).....	37
<u>Michigan v. Tucker</u> , 417 U.S. 433 (1974).....	32
<u>Mosher v. LaVallee</u> , 491 F. 2d 1346 (2d Cir.) cert. den. 94 S. Ct. 1611.....	23
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972).....	29
<u>Payne v. United States</u> , 294 F. 2d 723 (D.C. Cir. 1961) cert. den. 368 U.S. 883 (1961).....	32
<u>Schneckloth v. Bustamonte</u> , 412 U.S. 218 (1972).....	34
<u>Smith v. United States</u> , 324 F. 2d 879 (D.C. Cir. 1963) cert. den. 377 U.S. 954 (1964) reh. den. 379 U.S. 873.....	32

TABLE OF CASES

	<u>PAGE</u>
<u>Stone v. Powell</u> , 44 USLW 5313 (1976).....	18, 19, 22
<u>United States v. Allen</u> , 537 F. 2d 1387 (5th Cir. 1976).....	36, 37
<u>United States v. Breedlove</u> , 444 F. 2d 422 (5th Cir. 1971).....	37
<u>United States v. Candella</u> , 469 F. 2d 173 (2d Cir. 1972).....	
<u>United States v. Cotton</u> , 446 F. 2d 865 (8th Cir. 1971).....	37
<u>United States v. Duvall</u> , 537 F. 2d 15 (2d Cir. 1976).....	32
<u>United States v. Edmonds</u> , 432 F. 2d 577 (2d Cir. 1970).....	32
<u>United States v. Ellis</u> , 461 F. 2d 962 (2d Cir. 1972).....	34
<u>United States v. Garguilo</u> , 324 F. 2d 795 (2d Cir. 1963).....	22
<u>United States v. Massimo</u> , 432 F. 2d 324 (2d Cir. 1970), cert. den 400 U.S. 1022 (1971).....	37
<u>United States v. Meyer</u> , 417 F. 2d 1020 (8th Cir. 1969), reh. en bare den. 418 F. 2d 201 (1969).....	37
<u>United States v. Miller</u> , 449 F. 2d 974 (D.C. Cir. 1971).....	36
<u>United States v. Watson</u> , 423 U.S. 411 (1976).....	35
<u>United States v. Williams</u> , 524 F. 2d 407 (2d Cir. 1975).....	32
<u>United States v. Yanishevsky</u> , 500 F. 2d 1327 (2d Cir. 1974).....	24
<u>United States ex rel. Pisordi v. LaVallee</u> , 461 F. 2d 1020 (2d Cir. 1972).....	30

TABLE OF CASES

	<u>PAGE</u>
<u>United States ex rel. Carnegie v. McDougall</u> , 422 F. 2d 353 (2d Cir. 1970), cert. den 398 U.S. 912.....	30
<u>United States ex rel. Frazier v. Patterson</u> , 74 Civ. 4759 (SDNY 1975).....	37
<u>United States ex rel. Hines v. LaVallee</u> , 521 F. 2d 1109 (2d Cir. 1975), cert. den. 96 S. Ct. 884.....	32
<u>United States ex rel. Marcelin v. Mancusi</u> , 462 F. 2d 36 (2d Cir. 1972).....	20, 23
<u>United States ex rel. Maselli v. Reincke</u> , 383 F. 2d 129 (2d Cir. 1967).....	22, 23
<u>United States ex rel. Pella v. Reid</u> , 527 F. 2d 380 (2d Cir. 1975).....	28, 30, 32
<u>United States ex rel. Phipps v. Follette</u> , 428 F. 2d 912 (2d Cir. 1970).....	29, 30
<u>United States ex rel. Ramsey v. Zelker</u> , 356 F. Supp 275, affd 480 F. 2d (2d Cir. 1973).....	32
<u>United States ex rel. Rutherford v. Deegan</u> , 406 F. 2d 217 (2d Cir. 1969), cert. den. 385 U.S. 963.....	30
<u>United States ex rel. Tarallo v. LaVallee</u> , 433 F. 2d 4 (2d Cir. 1970), cert. den. 403 U.S.....	17, 20
<u>Wong Sun v. United States</u> , 371 U.S. 471 (1963).....	35

UNITED STATES COURT OF APPEALS
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THOMAS LIPUMA,

Petitioner-Appellee,

- against -

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ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellant.
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BRIEF FOR RESPONDENT APPELLANT

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York, Conner, J., granting petitioner Thomas LiPuma federal habeas relief, said judgment dated December 17, 1976. The District Court issued two opinions, dated September 24, 1976 and October 19, 1976, respectively and reproduced in respondent's appendix.

These opinions collectively are reported at 421 F. Supp. 791 (SDNY 1976). The decisions below followed a federal habeas evidentiary hearing held on April 14, 1976.

Respondent obtained a stay pending this appeal. Petitioner obtained bail pending this appeal from the District Court.*

Questions Presented

1. Whether petitioner has waived his claim for purposes of federal habeas review?

2. Whether petitioner was deprived of effective assistance of counsel because his lawyer "forgot" to make a motion to suppress physical evidence found on someone else's person, where (1) petitioner's guilt was established beyond a reasonable doubt by a positive in-court identification; (2) a motion to suppress physical evidence was of doubtful merit and counsel chose different strategy as to the evidence; and (3) petitioner's representation was otherwise forceful and effective?

* Respondent's attorney was never advised by the District Court of petitioner's counsel that petitioner was being released on bail. This fact was learned from the New York County District Attorney.

Facts

A. The Crime.

On the night of January 10, 1972, Mr. and Mrs. Geibel, of Phoenix, Arizona, returned to their room in Manhattan's Berkshire Hotel, only to find petitioner Thomas Li Puma and two other men in the suite. Li Puma was going through the room's three told the couple that they were hotel security men and left the room. Suspicious, Mr. Geibel called the hotel authorities, who notified the police. Li Puma and a co-defendant, Peter Raimondo, were found a short time later in a closet in another suite belonging to a third co-defendant, James Doyle. A pill box taken from the Geibel's room was found in Raimondo's pockets. Also in this room was an attache case containing several furs which had been taken from yet another room in the hotel while the occupants were absent.

Li Puma, Raimondo, and Doyle were immediately arrested. A subsequent indictment charged them with burglary in the second degree, petit larceny, and criminal possession of stolen property in the third degree, relating to the incident in the Geibel room (counts 1, 2, and 3), and burglary in the second degree, grand larceny and criminal possession of stolen property in the first degree, relating to the thefts from the other hotel room, which was occupied by a Mr. and Mrs. Robinson (counts 4, 5 and 6 of Indictment No. 600/1972).

Raimondo and Doyle subsequently pleaded guilty to reduced charges in satisfaction of the indictment. Li Puma went to trial. Before the commencement of the trial, the defense moved to suppress the identification testimony of Mrs. Geibel. A hearing was held and the court (Fraiman, J.) denied the motion. Later, during the actual trial itself, the defense moved to suppress certain physical evidence; the court declined to hear this motion after determining that it had not been previously made in any form.

Li Puma was convicted of burglary in the second degree and petit larceny under counts one and two of the indictment, which dealt with the Geibel burglary; the third count of the indictment, which charged Li Puma with criminal possession of Mrs. Geibel's property, was dismissed as duplicitous and was not submitted to the jury. The fourth, fifth, and sixth counts of the indictments, which dealt with the Robinson burglary, were also dismissed, pursuant to the court's ruling that there was insufficient evidence to link Li Puma to these crimes. Li Puma was sentenced to an indeterminate sentence of up to five years' imprisonment.

B. The Evidence At Trial

1. The People's Case

January 10, 1971: 8:30 p.m.: The Geibel break-in

In the early evening of January 10, 1971, Helen Geibel and her husband, of Phoenix, Arizona, left their room, suite 1710 in Manhattan's Berkshire Hotel, for a short walk (Geibel:90-91).^{*} Returning at about 8:30 p.m., Mrs. Geibel was surprised to find the defendant, Thomas Li Puma, sitting at the desk in the room. She asked, "What are you doing in my room?" to which Li Puma replied that there had been a robbery in the hotel and that he was a security officer investigating the crime (Geibel: 92-94, 119-121). Mrs. Geibel's husband then demanded that Li Puma produce his credentials, but the defendant replied that he had no such identification with him, and would go get some and be "right back with them" (Geibel: 94).

At this point two other men came into the room from the suite's adjoining bedroom and joined Li Puma. The three then brushed past Mr. Geibel and left the suite. As they walked to the elevator, they were followed by Mrs. Geibel's husband, who was still demanding identification (Geibel: 95-7). As soon as the three had left the floor, Mr. Geibel called the hotel desk to report the incident (Geibel: 96).

^{*} Numbered references are to the minutes of trial.

After making this report, the Geibels began to look around the suite. The desk at which Li Puma had been sitting was "ransacked", and the Geibel's luggage was strewn over the floor in the bedroom. The Geibel's discovered that a pillbox, which had been on a table in the bedroom, was missing, as was some change which had been in a pocketbook in the closet (Geibel: 100-102).

The Robinson break-in

Shortly before 9:p.m., just after the Geibels had surprised the intruders in suite 1710, William Robinson and his wife returned to their suite 1607-08 in the Berkshire. The pair had left this room at 7:30 (Robinson: 28-29). Once inside they immediately noticed that the suite was "disturbed." Checking, the Robinsons found that two fur coats, a leopard skin and a mink, were missing (Robinson: 32-33). Some jewelry, including a diamond ring, some gold cufflinks, and a pin were also missing (Robinson: 36-39).

The arrival of the police and the arrest

Patrolmen Robert Newham and John DeBona, responding to a radio call, arrived at the Berkshire Hotel a few minutes after 8:30 p.m. (DeBona: 51-52; Newham: 74-79, 81). The officers went to the Geibels' room, and were told by the Geibels about the three men who had been surprised in their room (DeBona: 53-54, 60-62; Newham: 74-75, 83-84). Obtaining a description of the three, the two officers, joined by

Detective William Donnelly, Patrolman Richard Powers, Patrolman James Greene and other officers, began to search the hallways and corridors of the hotel for the intruders (Donnelly: 141-44, 174-76; Powers: 258-60; Greene: 341-49).

After the corridor check and another check of new registrations, Officers Donnelly, Powers, and Greene were directed by a superior to check out rooms 612 and 613. Reaching the door of 612, Detective Donnelly knocked, and heard "Who is it?" in response. He replied that it was "the police," to be answered by a further inquiry - "what do you want?" Detective Donnelly then told the room occupant that "there had been a number of burglaries in the hotel and that we thought either his room was burglarized or possibly could be burglarized," and asked "could we come in?" (Donnelly: 144, 197-98; Powers: 260-71). Patrolman Greene, standing just next to Donnelly, heard "Yes" in reply to this question (Green: 344-45). After a short pause, which was accompanied by a "shuffling" sound, the door was opened by James Doyle, who was dressed in his underwear. Doyle let the three officers into the room (Donnelly: 145-46; Powers: 260-61; Greene: 344). Patrolman Greene remembered Doyle telling Donnelly that it was "all right for him to come in and check the security of the premises," but not to search them (Greene: 345-46).

Inside the room, the officers looked around. At this point, Detective Donnelly noticed Doyle looking nervously towards the closet. Donnelly opened the door to this closet and saw a human hand on a shelf. Donnelly closed the door, saying "there's nothing there," and then motioned to his partners. The officers drew their weapons and ordered the closet's occupant to "come out with your hands up." Thomas Li Puma then walked out of the closet, but the hand on the shelf remained. The command was repeated and Peter Raimondo also came forth (Donnelly: 145-47, 205; Powers: 261-64; Greene: 346-47).

James Doyle denied any knowledge of the men in his closet, but the three were arrested. The pillbox taken in the Geibel break-in was found in Raimondo's pocket, together with the cufflinks taken from the Robinsons (Donnelly: 148; Greene: 349). On a bed in the room the officers found a half-open attache case containing the pin and the mink and leopard skins taken from the Robinsons' room (Donnelly: 151-59; Powers: 261-62; Greene: 349-50).

Doyle's hotel-room statement that he did not know Li Puma was contradicted by Joyce Gersh, Doyle's girl friend who had seen Doyle with Li Puma and Raimondo on many occasions before the date of the robbery (Gersh: 423-27).

The events after the arrest

Helen Geibel identified Li Puma as one of the three intruders at a lineup held in the police station about an hour after the arrest (Geibel: 97-99, 111-112). Mrs. Geibel was sure of Li Puma's identity at trial as well: "as soon as I saw him I could identify him. I never would forget that face" (Geibel: 119).

Over two and one-half years after the date of the burglary, John McNally, a private investigator employed by the defense, came to visit Mrs. Geibel in Phoenix. Mrs. Geibel was not sure what she had said to McNally, and admitted that she might have told him that she didn't know if she would still be able to identify Li Puma. However, she reiterated that she was sure of his identity at trial (Geibel: 117-120).

2. The Defense

John McNally, a private investigator retained by the defense, stated that he had interviewed Mrs. Helen Geibel in Phoenix, Arizona, on November 4, 1974 (McNally: 430-32). Mrs. Geibel had told him that "the faces had left her" and that she thought that the tallest of the three intruders was not at the desk [Li Puma was in fact the tallest of the three] (McNally: 432-32).

However, Mrs. Geibel did tell Mr. McNally that she was positive of the identity of the man whom she had picked out at the lineup (McNally: 467). Mr. McNally had covertly tape-recorded this interview, and this tape was played to the jury. The first ten minutes of the McNally-Geibel interview, however, were not on the tape because McNally's machine had "jammed" (McNally: 462).

Mrs. Helen Geibel, called as a defense witness, reported her previous testimony and again admitted telling Mr. McNally that she was not sure if she could identify Li Puma, after the two-and-a-half-year- gap between the burglary and the interview (Geibel: 503). However, she once again stated that, once in court, "his whole face came back to me" and she was sure of Li Puma's identity as one of the robbers (Geibel: 304-05).

James Doyle, one of Li Puma's co-defendants, stated that he had pleaded guilty to the instant burglary, receiving a sentence of four years' imprisonment (Doyle: 623). Basically, Doyle stated that he and Peter Raimondo had ransacked the Geibel apartment (Doyle: 624-26). Li Puma, who had been a friend of Doyle's for five years, had coincidentally met him earlier that afternoon, and Doyle had invited him to

visit his hotel room later that evening. Five minutes after Li Puma arrived, the police came, and Doyle told Li Puma to hide. Li Puma had nothing to do with the robbery (Doyle: 627-28).

On cross-examination, Doyle stated that Peter Raimondo was the "brains" of the instant burglary, and had chosen the hotel (Doyle: 632-35). He also stated that nothing had actually been taken from the Geibel's apartment, although he later admitted that "Petey might have stuck something in his pockets that I didn't know about" (Doyle: 640-41). There were only two people in the Geibel room, Doyle and Raimondo (Doyle: 643). Raimondo was the one who told the Geibels that the pair were hotel detectives (Doyle: 648). Doyle also stated that when the police came to the door of Doyle's room, they "just barged in," apparently aware that Doyle was the burglar (Doyle: 659).

C. Efforts of Petitioners Counsel in His Behalf

Since the judgment below turned on the alleged incompetence of petitioner's defense counsel, an analysis of the facts concerning efforts they expended in his behalf is necessary.

Defense counsel hired an investigator to unearth the details of defendants' apprehension (H 53, 66-67)*. A defense investigator went to Arizona to interview Mrs. Geibels, and

* Page numbers preceded by "H" refer to habeas hearing minutes.

testified at trial that she had told him that "the faces had left her". (T 430-431). Mrs. Geibels admitted that she may have told him that she was unsure if she would be able to recognize petitioner (117-120). The interview with Mrs. Geibels had been recorded and was played to the jury.

The defense also called James Doyle to the stand to testify that the acts which occurred at the Geibel apartment had been committed only by he and Raimondo, and that petitioner had nothing to do with the crime.

Defense counsel made discovery motions to inspect the grand jury minutes and to dismiss the indictment.

The defense was successful in obtaining a dismissal of four counts of a six count indictment and the exclusion of evidence relating to the Robinson robbery.

Defense counsel were permitted to interview arresting police officers before the trial, which was done.

Defense counsel did a most creditable job at the trial itself. Defense counsel did a through job in hammering home the main defense - namely that no evidence could be connected to petitioner and petitioner was a victim of mistaken identification. In particular, the cross-examination of the People's main witness, Mrs. Geibel, was thorough and comprehensive.

D. The "Forgotten" Motion to Suppress

In the habeas evidentiary before Judge Conner, petitioner's state court defense counsel freely, and almost enthusiastically, confessed to negligence and oversight in not putting before the Court petitioner's motion to suppress. This was apparently due to a mixup between two co-counsel (H61, 64). The slip-up was due to a "mistake" or "oversight" (H 62, 63) which may have consisted largely of not making a motion on papers. Defense counsel contended that in their opinion a motion to suppress had always been meritorious, and that this opinion had been held prior to trial. (H 53, 60, 62, 66).

This is not quite the same story as emerges from the interesting pages of the state trial transcript. At the outset of the trial, the court inquired whether any pre-trial motions were pending, and counsel replied that the only such matter was a motion to suppress Mrs. Geibel's identification of Li Puma at a lineup (293, 540). A hearing was held on this motion, which was then denied. It was only later, after several of the People's witnesses had testified, that counsel indicated that a motion to suppress physical evidence had been made on behalf of one of the co-defendants, and

had also been joined in by Li Puma (285-88). An associate of Mr. Coiro's then indicated that he had orally joined in this motion when it was pending before another judge (290-93). Throughout the remainder of the trial, Justice Fraiman made exhaustive inquiries in an attempt to clarify this situation (271-424, 455-57, 533-44), ultimately establishing that no such motion had ever been made, and ruling that:

"[I]n the absence of any independent recollection by the court [before which the motion was alleged to have been made], by the assistant district attorney, in the absence of any written application to join in this motion, and in the absence of anything on the official transcript in this case of any motion that was ever made orally or in writing to join in this application to suppress, the court finds that no motion was made prior to trial in this case to suppress, and that the facts which could have formed the basis for such a motion were readily available to the defendant prior to trial, and no other factors have been called to the attention of this court which would warrant the court's entertaining now such a motion during the trial, and for these reasons the court will decline to entertain the motion to suppress by this defendant." (537-38).

At the conclusion of the court's ultimate decision declining to hear the motion, Mr. Coiro made a statement to court:

"Now, in light of your Honor's declining to entertain the motion, Judge, and I say this as a member of almost twenty-one years standing before the bar, and I state to your Honor in light of that ruling your Honor has, in effect said that I did not perform my legal functions properly, that in that respect I was derelict and I was incompetent.

* * *

"Maybe because of the present status of the court situation today and the moving of cases for trial and I was actually engaged and I delegated that authority to an associate of mine, whom I have the utmost faith in, and I still say, Judge, he said he joined in that motion. I know he did.

* * *

"This man faces a lot of years, Judge, if he is convicted here. And based on a right that he has, I waived it, and Judge, If I have to go before the Appellate Division and they have to say to me, 'Mr. Coiro, you were derelict,' well, then, Judge, I will have to take my punishment like any other man." (450-41).

The court replied to Mr. Coiro by noting "that it may be that the failure to make the motion is not as significant as it would appear to you," (543) and denied a motion for a mistrial on the grounds of lack of diligent representation. Later, during sentencing, defendant asked for a "hearing" to prove that counsel had told him that he was moving to suppress physical evidence. The application for a hearing was denied.

Significantly it is interesting to note that prior to this colloquy petitioner's counsel objected to the admission of the pill box evidence on the ground that it had never been connected with the defendant and was admitted by the trial court "subject to connection", (100). That the pill box may have been unlawfully seized was never mentioned by counsel. The motion to dismiss the indictments was based in great part on the People's failure to prove that petitioner had in any way possessed the pillbox found in Raimondo's pocket, or other evidence relating to the Robinson burglary, found in Doyle's hotel room (M: 548-609). Indeed, long before the issue of the policemen's entry into the hotel room was injected into the trial the defense elicited testimony to show that there was no connection between the items seized and petitioner (154-190).

Thus it is not at all clear that defense counsel always thought, even before trial, that they had in their hands a meritorious suppression motion, as they now claim. The state trial transcript shows otherwise. Moreover, it is not at all clear that petitioner's counsel thought the motion was as well founded as they would now have us believe. Petitioner's first defense counsel thought that the chances of success on the motion might be "tough " (H12). A subsequent defense counsel testified that he thought there would be a "problem"

in proving the motion to suppress (H51). Before trial defense counsel agreed the motion would be "illfated" (H90). The assistant district attorney said he and defense counsel had thought the motion would be "inappropriate" (14). Only during trial and after presentation of a substantial portion of the People's case did Mr. Coiro feel that perhaps his client had a sufficient chance of success on a motion to suppress physical evidence to warrant a hearing (475-476).

POINT I

PETITIONER HAS WAIVED HIS CLAIM
FOR PURPOSES OF FEDERAL HABEAS
REVIEW.

In United States ex rel. Tarallo v. LaVallee, 433 F. 2d 4 (2d Cir. 1970), this Court held that a state prisoner who does not timely file a motion to suppress may not subsequently raise his claim in federal court habeas review*. Tarallo has never been overruled and is squarely applicable here. In its opinions the District Court never mentioned Tarallo and its granting of the writ was manifest error.

* The Tarallo court found that this failure was harmless beyond a reasonable doubt, but the holding was not premised on that ground.

Simply attaching the label "ineffective assistance of counsel" to the situation, as petitioner has cleverly done in this case, cannot cure this error or circumvent Tarallo.^{*} If this were the case, New York's timeliness requirements for making motions to suppress would be easily circumvented and truly meaningless.

The argument that affording petitioner a new motion to suppress would render meaningless New York's timeliness rules was rejected by the District Court as a "curious legal theory" which sacrificed constitutional rights** on the alter of procedural default. 421 F. Supp. at 792, fn. 3. It is respectfully submitted that respondent's point is hardly a curiosity. The purpose of timeliness rules is to insure that certain legal procedures occur at the proper time. The purpose is not to sacrifice anyone's rights. This is surely obvious. Henry v. Mississippi, 379 U.S. 443 (1965).

-18-

^{*} The U.S. Supreme Court has just granted certiorari in a case squarely raising the issue in this case. See Browder v. Director of Illinois Corrections, No. 76-5325, cert. granted 45 USLW 3508. One of the questions presented there is whether Stone v. Powell, 44 USLW 5313 (1976), precludes a state prisoner from raising Fourth Amendment claims on federal habeas where claim is that incompetence of counsel deprived him of an opportunity to raise that claim. 45 USLW 3524.

^{**}Of course, the "right" to have illegally seized evidence suppressed at trial is not a constitutional right, but a judicially created remedy to enforce a constitutional right. Stone v. Powell, 44 USLW 5313, 5318 (1976).

Between the time of the habeas hearing below and the District Court's decision below, the Supreme Court decided Stone v. Powell, 44 USLW 5313 (1976). The Supreme Court held that a prisoner could not relitigate his Fourth Amendment claim in federal habeas if he had an "opportunity for full and fair litigation" of the claim in state court.

Here petitioner had a full and fair opportunity to contest the admissibility of the evidence in question; however he simply failed to utilize that opportunity. Although the District Court never mentioned Stone v. Powell, it is clear that that case forecloses federal habeas relief.*

Gates v. Henderson, ___, F. 2d ___ (2d Cir. 1977) (Slip. Op. 1345)* which discussed the meaning of the word "opportunity" in Stone v. Powell, is not to the contrary. In Gates this court held on federal habeas review in a 2 to 1 decision that a prisoner was entitled to a motion to suppress ten years after the fact where the "opportunity" taken to suppress the evidence consisted of a vague objection to the admission of the evidence on "constitutional grounds". The

-19-

*It is also clear that Stone v. Powell is retroactive. See Gates v. Henderson, ___ F. 2d ___ (2d Cir. 1977) Slip. Op. 1345, 1352.

**The State has petitioned for rehearing in Gates.

Gates court emphasized that specificity, not timeliness of the objection was at issue and on that ground specifically distinguished Tarallo. Gates, supra, at 1358, n 8. Thus the Gates decision cannot be said to be controlling; indeed Gates rules implicitly if not explicitly that Tarallo is still good law.

POINT II

PETITIONER WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL.

The District Court concluded that petitioner was deprived of effective assistance of counsel because his counsel inadvertently neglected to make a motion to suppress which was arguably meritorious. This conclusion was completely erroneous.

The time honored standard in this Circuit for effective assistance of counsel is whether counsel's performance was horribly inept, shocks the conscience of the Court, makes a trial a farce and mockery of justice, or constitutes a total failure to present the cause of the accused. See United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36 (2d Cir. 1972) (quoting cases at 45). The District Court recognized the applicable principle but plainly misapplied it.

Here it is plain that defense counsel performed most ably and competently for petitioner. Numerous motions and investigative efforts were made on his behalf, most centered around the thrust of petitioner's defense, namely that his identification by Mrs. Geibels was erroneous and that no burglarized items could be connected to him. (See Facts, Part C, supra). Defense counsel performed most ably and competently at the trial itself in setting forth petitioner's theory of defense. It is impossible to conclude on this record that petitioner's trial was a "mockery", or that his representation was "horribly inept" or "shocks the conscience" or that there was a "total failure" to present his cause at trial. To conclude otherwise is to empty these phrases of their plain meaning. Significantly the District Court did not discuss the total and overall efforts of defense counsel. Significant also was Justice Fraiman's observation that "(t)he court observed that Mr. Coiro was an adequate and perfectly competent attorney who represented the defendant to the best of his ability" (27).

The District Court's decision is based frankly on the premise that an attorney's forgetfulness or inattention as to certain facets of a case might at times constitute ineffective

assistance of counsel. 421 F. Supp. at 791. For this fundamental premise the District Court cited no authority other than a "Cf" reference to United States ex rel. Maselli v. Reincke, 383 F. 2d 129 (2d Cir. 1967), a case completely different on its facts.* Under the circumstances, a "Cf" reference without some explanation is of no assistance. See Gates v. Henderson, supra, at 1353, (criticizing Supreme Court for "Cf" citation in Stone v. Powell, supra).

Mere neglect to make a timely motion to suppress may in some circumstances constitute an error of counsel, but this Court has held that "errorless counsel is not required, and before we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect'". United States v. Garguilo, 324 F. 2d 795, 796 (2d Cir. 1963) quoting Brubaker v. Dickson, 310 F. 2d 30, 39 (9th Cir. 1962), cert. den. 372 U.S. 978 (1963). There was clearly no "total failure" here to present petitioner's cause despite the "error" of his counsel; as noted above petitioner's main defense theories were ably and aggressively presented to the jury.

* In Maselli, defendant's counsel failed to appeal or move to set aside guilty verdict, though counsel knew an appeal was meritorious and although his client requested an appeal. A co-defendant convicted on apparently the same evidence had had his conviction reversed on appeal for insufficient evidence.

Before an "error" of counsel can rise to the dimension of constitutional deprivation, it must rise to a level far beyond inadvertence or neglect. As the Eighth Circuit said in Brown v. Swenson, 487 F. 2d 1236, 1240 (8th Cir. 1973):

"Appellant must show actions of his lawyer which would constitute such conscious conduct as to render pretextual the attorneys' legal obligation to fairly represent the appellant and circumstances which demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client." (emphasis added).

Here counsel's error was neither conscious nor deliberate, if their "abject" confessionals are to be believed. The failures found to constitute incompetence of counsel in Mosher v. LaVallee, 491 F. 2d 1346 (2d Cir.) cert. den. 94 S. Ct. 1611 (1974) and United States v. Reincke, supra, fall within the Brown definition but the alleged error here, under any reasonable view of the facts, simply does not. See also United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36 (2d Cir. 1972) (claim of failure to investigate insanity defense in murder case did not - on facts of case - constitute ineffective assistance of counsel).

In arguing that counsel's professed neglect here did not constitute deprivation of effective assistance of counsel, respondent again stresses that this "neglect" appears in fact to have been a convenient afterthought based on hindsight and regret. See pp. 13-17, *supra*.

The District Court in fact appears to have been applying the less stringent "reasonably effective assistance of counsel" test, although even by that test counsel's performance passes the mark. In any event this Court has declined to adopt that standard. United States v. Yanishevsky, 500 F. 2d 1327, 1333 n. 2 (2d Cir 1974).

Assuming arguendo that an inadvertent failure to make a motion to suppress might in some cases constitute ineffective assistance of counsel, it is clear that this not such a case because (1) petitioner's guilt was established beyond a reasonable doubt by positive identification testimony and (2) petitioner's motion to suppress physical evidence was of doubtful merit and counsel chose other strategy with respect to that evidence.

A. Mrs. Geibel's Identification

The District Court found the error in failing to make a motion to suppress was not harmless because of its doubts about Mrs. Geibel's identification of petitioner. This conclu-

sion was clearly erroneous since the identification of petitioner was an unusually solid and positive one.

A pretrial Wade Stovall hearing was held on petitioner's challenge to Mrs. Geibel's January 10, 1972, lineup identification. At this hearing three witnesses testified. Among them was the victim, Mrs. Geibel. She testified that she observed petitioner at the crime scene for three or four minutes (17). She testified that she could not describe the other two perpetrators because they were not in the same room (21). She recognized petitioner by his features, not by his height or color (24); Mrs. Geibel remembered Li Puma for his "distinctive" profile. She testified she viewed three separate lineups and picked out one man out of all three - Li Puma. This identification occurred on the second or third lineup, not the first. (29-30). Mrs. Geibel said no one told her whom to identify; she was simply asked to view a lineup (19, 28). Mrs. Geibel concluded by saying that she was "positive" petitioner was the perpetrator (41).

Having heard all the witnesses, Justice Fraiman ruled that Mrs. Geibel's out of court identification was admissible. The Court ruled in pertinent part as follows:

THE COURT: The Court finds from the evidence presented that the complaining witness, Mrs. Geibel, was taken to the 17th Precinct Station House within several hours after her apartment was burglarized, during which time, she testified, she was able to observe the defendant for approximately three or four minutes.

At the station house she was shown six men in a line up, one of whom was the defendant. The photograph was taken in the line up, which has been deemed marked Defendant's Exhibit A for identification.

That photograph indicates that the other five individuals in the line up were of similar build and appearance as the defendant.

All six individuals in the photograph were white males, in their late twenties or early thirties, which is the general description that also fits the defendant.

The Court finds that no undue suggestion or indeed suggestion of any kind was made by anyone as to which of the six individuals, if any, were the defendant, but that unaided the witness picked the defendant out from the line up as the individual who had participated in the burglary of her apartment.

The fact that before she participated in the observation of the line up she was told that the police had apprehended three suspects to the burglary, in no way vitiated the effectiveness of her identification at the station house and nor in itself constituted an improper suggestion on the part of the police as to who the perpetrator of the burglary was.

Accordingly, in view of the fact that the police followed proper procedures in this case and no improper suggestions were made to the complaining witness prior to her identification of the defendant, the Court will deny the motion to suppress the witness' in-court identification.

* * *

MR. COIRO:

* * *

Just so my argument is complete, I neglected to state that the way I viewed the picture, Defendant's Exhibit A, Judge Fraiman, I think it was unfair in the respect that there is one individual in that -- depicted in that picture that I would state, in my opinion, appears to be about 55 years of age.

THE COURT: Well, the picture speaks for itself.

MR. COIRO: Yes, correct, your Honor.

THE COURT: Mr. Coiro, the Court, however, in examining the picture is satisfied that, in general appearance, the other five individuals were similar to the defendant, and that they were in roughly the same size, color and age of the defendant.

Obviously, they were not so similar to the defendant that they could be mistaken for his siblings, but the similarity was sufficient so that the identification of the defendant by the complaining witness was in no way facilitated unduly by the dissimilarity of the other individuals in the line up.

Mr. Justice Fraiman's through and considered determination was entitled to a presumption of correctness under the provisions of 28 USC § 2254(d) absent an express finding that the state court hearing fell into one of the eight categories

enumerated in that subsection. The District Court never mentioned 28 USC § 2254(d) and therefore presumably considered the matter de novo*, which it had no power to do. See United States ex rel. Pella v. Reid, 527 F. 2d 380, 384 (2d Cir. 1975).

Mrs. Geibels identification testimony at trial was as positive as her identification testimony at the Wade hearing. She testified to the same effect as she did in her Wade hearing, but emphasized that she got a "good look" (45) and that it was petitioner's features and "distinctive" face that she recalled (112, 119). Mrs. Geibel said at trial that "as soon as I saw him I could identify him. I never would forget that face" (119). Later Mrs. Geibel admitted that after two and one-half years she was not sure if she could identify Li Puma. However, she again stated that, once in court, "his whole face came back to me" and she was sure of Li Puma's identity as one of the robbers (304, 305, 503).

-28-

*This federal court de novo consideration of the state court lineup, in addition to being without authority in law, was done without any evidentiary hearing on this issue. The District Court gratuitously thought the lineup occurred under "somewhat suggestive" circumstances but never found the lineup to be constitutionally infirm. The District Court's order announcing that a habeas hearing was required did not mention any identification issue. Mrs. Geibel's identification was not put in issue until the District Court's decision below - too late of course for respondent to present evidence on the question. Interestingly enough, petitioner herein never challenged the integrity of his identification in the state courts on appeal.

Significantly, although the District Court concluded de novo that the lineup occurred under "somewhat" suggestive circumstances, the District Court never concluded that the suggestive procedure was so conducive to irreparably mistaken identification or had such a tendency to give rise to a very substantial likelihood of irreparable misidentification that allowing the in-court identification violated due process United States ex rel. Phipps v. Follette, 428 F. 2d 912 (2d Cir. 1970).

The inquiry here turns on the "totality of the circumstances", Neil v. Biggers, 409 U.S. 188 (1972), and involves an appraisal of such external factors as (1) opportunity of the witness to view the suspect; (2) the witness prior description of the suspect; (3) the level of certainty of the witness, and (4) and the length of time between the crime and the confrontation. *Id.* at 199.

Applying the factors set forth in Neil v. Biggers to this case, it is clear that there was no substantial likelihood of misidentification. Mrs. Geibel observed petitioner for several minutes; her level of certainty was high and remained high; and the time between crime and confrontation was very

short - just several hours. Compare United States ex rel. Pella v. Reid, supra (no due process violation where victim had glimpse of accused for fifteen seconds, accused resembled one of victims friends, and victim was thoroughly cross-examined); United States ex rel. Bisordi v. LaVallee, 461 F. 2d 1020 (2d Cir. 1972) (impermissible suggestion in identification procedure, but no substantial likelihood of misidentification, where, inter alia, victim had three minutes to observe defendant in good light); United States ex rel. Phipps v. Follette, supra (identification evidence allowed wherein, inter alia, victim struggled with assailants twenty to thirty seconds); United States ex rel. Carnegie v. Mac Dougall, 422 F. 2d 353 (2d Cir. 1970), cert. den. 398 U.S. 912 (identification evidence allowed where, inter alia, confrontation occurred three months after crime); United States ex Rel. Rutherford v. Deegan, 406 F. 2d 217 (2d Cir. 1969), cert. den. 385 U.S. 963, (identification evidence allowed where, inter alia, confrontation occurred eleven days after crime).

Under all the above circumstances the District Court's conclusion that Mrs. Geibel's identification of petitioner was "dubious" (412 F. Supp. at 791) is inexplicable and patently indefensible. The District Court's statement that Mrs. Geibel

had only "seconds" to observe petitioner is simply false; Mrs. Geibel testified she observed him for three or four minutes (17). That Mrs. Geibel was "elderly" or that her husband could not identify petitioner proves nothing. (Id) The District Court's gratuitous suggestion that the lineup occurred under "somewhat suggestive" conditions (Id) is puzzling. If the District Court was referring to the alleged fact that Mrs. Geibel "conceded" that she recognized police officers in the Li Puma lineup*, the fact remains that the identification occurred in the second or third lineup. In any event as noted the District Court did not find the lineup constitutionally infirm.

The simple truth which emerges so dramatically from the trial transcript is that Mrs. Geibel saw a face which scarred her memory for years to come. Clearly in view of Mrs. Geibel's positive identification of petitioner - an identification which was never shaken under intensive cross-examination - and in view of the District Court's cavalier disregard of 28 USC § 2254(d), petitioner's guilt is plain beyond a reasonable doubt. Any "neglect" to make a motion to suppress is

* Defense counsel at the Wade hearing made no reference to this "concession".

therefore harmless error beyond a reasonable doubt.* Chapman v. California, 386 U.S. 18 (1967); Harrington v. California, 395 U.S. 250 (1969). Compare United States ex rel. Hines v. LaVallee, 521 F. 2d 1109 (2d Cir. 1975), cert. den. 96 S. Ct. 884 (statement arguably elicited in violation of Miranda and admitted was harmless error where evidence of guilt overwhelming); United States v. Williams, 524 F. 2d 407 (2d Cir. 1975) (harmless error where FBI agent testified defendant declined to testify after receiving Miranda warning); United States v. Duvall, 537 F. 2d 15 (2d Cir. 1976); Milton v. Wainwright, 407 U.S. 371 (1972) (introduction of confession harmless error).

-32-

* Any statement to argue that the identification must be suppressed as a result of the alleged unlawful entry into Suite 613 must be rejected. See Michigan v. Tucker, 417 U.S. 433 (1974) (testimony of witness discovered from defendant through illegal questioning held admissible); Smith v. United States, 324 F. 2d 879 (D.C. Cir. 1963), cert. den. 377 U.S. 954 (1964) reh. den. 379 U.S. 873 (testimony of eyewitness will not be suppressed because police learned of his existence and identity from defendant while defendant illegally detained); Payne v. United States, 294 F. 2d 723, 727 (D.C. Cir. 1961), cert. den. 368 U.S. 883 (1961) (suppression of complaining witness would be "unthinkable"); United States ex rel. Ramsey v. Zelker, 356 F. Supp. 275 (SDNY 1973), affd 480 F. 2d 916 (2d Cir. 1973) (constitutional violation in detention followed by identification at station would not vitiate confession). The holding in United States v. Edmons, 432 F. 2d 577 (2d Cir. 1970) has been limited to cases where had arrests are made deliberately for purposes of obtaining identifications. United States ex rel. Pella v. Reid, supra, at 382-383.

B. Likelihood of success of Petitioner's Motion to Suppress and his Standing to make the Motion and Defense Counsel's Actual Strategy

The District Court concluded that a motion to suppress would not have been of "obvious futility". 421 F. Supp. at 791. Apparently the District Court relied on the "fervent and abject confessionals" of defense counsel at the habeas hearing below. Id, 790. However, the record shows that defense counsel thought at the time of trial itself that a suppression motion was of doubtful merit or had little chance of success. See Facts, Part D, pp. 13 et seq. supra. This is a clear case of self-serving hindsight of which this Court has always and rightfully been suspicious in evaluating ineffective assistance of counsel claims.

The District Court's conclusion that a suppression motion was not "obviously futile" is clearly erroneous. The record demonstrates that the search was a lawful search based on consent. As noted above (Facts, Part B, supra), the overwhelming weight of evidence in the state trial record supports a theory of search by consent.

Three police officers went to Doyle's hotel room. Outside, Detective Donnelly knocked and, when Doyle replied "who is it?" the detective stated "it's the police," to be answered by a further inquiry: "what do you want?" Detective

Donnelly then told the occupant that "there had been a number of burglaries in the hotel and that we thought either his room was burglarized or possibly could be burglarized," and asked "could we come in?" One of the officers, Patrolman Greene, heard a "Yes" in reply to this question. Doyle, dressed in his underwear, then admitted the officers. Patrolman Greene remembered Doyle telling Donnelly that it was "all right for him to come in and check the security of the premises, but not to search them" (Donnelly: 144, 197-98; Powers: 260-71; Greene: 344-46).

Once inside the room, Detective Donnelly noticed Doyle continuously glancing "nervously" towards the closet. The officer, who had heard a "shuffling" noise before Doyle opened the outer door (Doyle: 144), opened the closet and was confronted by a human hand on a shelf. Donnelly closed the door, saying "there's nothing there." He then motioned to his partners, drew his gun and ordered the occupants of the closet out; Thomas Li Puma and Peter Raimondo complied.

Doyle's testimony is simply that the police "barged in" (659).

Admittedly, in search cases "consent is not lightly to be inferred", United States v. Ellis, 461 F. 2d 962 (2d Cir. 1972) However, under a consideration of the "totality of the circum-

stances", Schneckloth v. Bustamonte, 412 U.S. 218 (1972), the police entry into Suite 613 was clearly freely consented to. Doyle admitted the police without being subjected to coercion or duress, as shown by the fact that petitioner told them not to search the room. Compare United States v. Watson, 423 U.S. 411, 424 (1976) (fact of custody alone not sufficient in itself to negate consent); United States v. Ellis, supra (consent by accused's girl friend even though under arrest); United States v. Candella, 469 F. 2d 173 (2d Cir. 1972) (consent where accused, upon request, pointed to guns); Frazier v. Cupp, 394 U.S. 731, 74 (1969) (consent to search duffel bag on police request).

Once inside the room the opening of the closet was justified on precautionary grounds by the suspicious "shuffling" heard before Doyle opened the door and Doyle's nervous glances in the direction of the closet. These factors indicated danger and concealment.

Petitioner does not even have standing to suppress any evidence in any event. The pill box, which was the only physical evidence connecting petitioner to the Geibel burglary, was found on Raimondo, not on petitioner. The District Court apparently concluded that petitioner's "incriminatory self-concealment" in the room itself conferred the necessary standing, citing Wong Sun v. United States, 371 U.S. 471, 485-486 (1963).

It is difficult to conceive how petitioner's "incriminatory self-concealment" in a closet confers on him any reasonable expectation to privacy of a search of the suite he had obviously voluntarily abandoned in any realistic sense. On the contrary, hiding in a closet is the very antithesis of expectation of privacy.

Assuming arguendo petitioner had standing to challenge the initial entry into Suite 613 it does not follow that petitioner has standing to challenge all fruits of the search in Suite 613 of the search of other persons in that Suite. Wong Sun speaks to the admissibility of evidence seized; it does not speak to the principle of the scope of standing within the separate links of the alleged "poisonous tree" chain. See United States v. Allen, 537 F. 2d 1387 (5th Cir. 1976).

The truth remains, poisonous tree or no poisonous tree, that Fourth Amendment rights are personal rights which cannot be vicariously asserted. See Alderman v. United States, 394 U.S. 165 (1969). Assuming arguendo an illegal entrance into Suite 613, it does not follow that petitioner has standing to suppress the pill box found on Raimondo. See United States v. Miller, 449 F. 2d 974 (D.C. Cir. 1971) (defendant with standing to challenge police entry into suite did not also have standing

to challenge search of drawer containing gun where petitioner had no authority to open or use drawer and did not own gun; even if police entry into suite unlawful, petitioner had no standing as to gun); United States v. Breedlove, 444 F. 2d 422 (5th Cir. 1971) (Assuming arguendo illegal arrest of occupants of car, occupants A, B and C had no standing to suppress testimonial evidence of occupants D and E). See also United States v. Allen, supra.

Finally, it is plain that counsel's trial strategy with respect to the pill box was not to seek its suppression but to show that it could not be connected to the petitioner. The choice for tactics and strategy lies with petitioner's counsel. United States v. Massimo, 432 F. 2d 324 (2d Cir. 1970), cert. den. 400 U.S. 1022 (1971). That strategy and tactic cannot be disavowed now. Such strategy is not uncommon. See generally United States v. Cotton, 446 F. 2d 865 (8th Cir. 1971); United States v. Meyer, 417 F. 2d 1020 (8th Cir. 1969), reh. en banc denied 418 F. 2d 201 (8th Cir. 1969); Harried v. United States, 389 F. 2d 281 (D.C. Cir. 1967); Kapsalis v. United States, 345 F. 2d 392 (7th Cir. 1965), cert. den. 382 U.S. 946 (1965); United States ex rel. Frazier v. Patterson, ____ F. Supp. ____ (SDNY 74 Civ. 4759, Gagliardi, J) (decision annexed).

CONCLUSION

THE JUDGMENT BELOW MUST BE
REVERSED.

Dated: New York, New York
February 28, 1977

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT
OCT 6 9 01 AM '75
S.D. OF N.Y.

-----x
U.S.A. ex rel. CALVIN FRAZIER

74 Civ. 4759

-against-

MEMORANDUM
DECISION

J. W. PATTERSON, Superintendent
Eastern N.Y. Correctional Facility

-----x
GAGLIARDI, D. J.

#43217

This is an application for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Petitioner was convicted in 1968 of two counts of murder in the first degree after a jury trial in the Supreme Court, Bronx County and is currently serving two concurrent sentences of life imprisonment. The judgment of conviction was affirmed by the Appellate Division and the New York Court of Appeals. Subsequently, petitioner moved in the State Supreme Court to vacate his conviction. This motion was denied and the Appellate Division refused to grant leave to appeal. Petitioner has thus concededly exhausted his state remedies and his application for a writ of habeas corpus is properly before this Court. 28 U.S.C. §2254(b).

Petitioner claims that the court-appointed defense counsel at his trial was so inadequate and ineffective as

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to deny petitioner his right to representation by counsel under the Sixth Amendment to the United States Constitution. Specifically, petitioner claims that his counsel failed to move to suppress certain evidence that had been seized by the police allegedly in violation of petitioner's Fourth Amendment protections, although petitioner had explicitly requested counsel to do so. The evidence in question was used against petitioner at trial.

In order to succeed in a Sixth Amendment claim of inadequate representation, the petitioner must show a "lack of effective assistance of counsel. . . of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." United States v. Wight, 176 F.2d 376, 379 (2d Cir.), cert. denied, 338 U.S. 950 (1949). This standard has been consistently adhered to and reaffirmed in this Circuit. United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 237 (2d Cir.), cert. denied, 404 U.S. 967 (1971); United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971). "Errorless counsel is not required, and before we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental re-

spect.'" United States v. Garquilo, 324 F.2d 795, 796 (2d Cir. 1963), quoting from Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963), cited with approval, United States ex rel. Marcelin v. Mancusi, supra.

Applying this test to the instant case, this court concludes, as did the State Court, People v. Frazier, No. 533/67 (July 9, 1974) (unreported), that petitioner was adequately represented by counsel and thus afforded his Sixth Amendment right. The court has reviewed the record of the State Court trial and finds that counsel provided careful, dedicated, and wholly adequate service to the petitioner. Defense counsel conducted a Wade hearing and prevailed in suppressing the out-of-court identifications of several witnesses who had implicated the defendant. (Record at 161). In addition, he conducted vigorous cross examination of the State's witnesses, employed the services of a pathologist to analyze certain blood samples offered in evidence, made numerous procedural objections, presented a cogent and energetic summation, and otherwise conducted the defense in a manner far from "a mockery of justice." Indeed, the trial judge commended counsel for an "admirable job." (Record at 943).

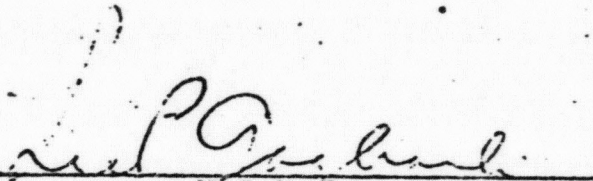
It is unnecessary for this court to speculate as to what counsel's reasons were for choosing not to move

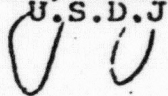
to suppress the evidence seized by the police. It may be, as respondent suggests, that the state of the law in 1968 and prior to the Supreme Court's decision in Chimel v. California, 395 U.S. 752 (1969),* was such that counsel believed the evidence to be admissible. In any event, what is particularly noteworthy is that counsel objected to the introduction of the very evidence in question here on the ground that the evidence had never been connected with the defendant. (Record at 523-29, 688-91). Thus, it is most reasonable to conclude that the decision not to object on Fourth Amendment grounds was based on conscious consideration of legal opinion, trial tactics, and strategy, which lie in the sole discretion of counsel. See United States v. Massimo, 432 F.2d 324 (2d Cir. 1970), cert. denied, 400 U.S. 1022 (1971); United States v. Birrell, 286 F. Supp. 885 (S.D.N.Y. 1968). Defendant had a right to counsel. He did not have a right to counsel with whose advice he completely agreed. Id. at 894.

*The New York Court of Appeals has held that the test set out by Chimel is not to be applied retroactively. People v. Ruiz, 34 N.Y. 2d 529, 309 N.E.2d 369, 354 N.Y.S. 2d 98 (1974); People v. Lo Cicero, 28 N.Y. 2d 525, 267 N.E. 2d 885, 319 N.Y.S. 2d 72 (1971).

Accordingly, petitioner's application for a writ of habeas corpus is denied.

So Ordered.



U.S.D.J.


Dated: New York, New York
October 7, 1975.

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Ralph McMurry
 , being duly sworn, deposes and
says that he is employed in the office of the Attorney
General of the State of New York, attorney for respondents appellants
herein. On the 28th day of February, 1977, he served
the annexed upon the following named person :

Nancy Rosner
401 Broadway -
NY NY

Attorney in the within entitled action by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that
purpose.

Sworn to before me this
28th day of February, 1977

Kenneth J. McKay
Assistant Attorney General
of the State of New York

Ralph McMurry